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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

PREMIER GAMES, INC.,
through Gerald D. Goudeau, Jr.,
SLIDELL 76 TRAVEL CENTERS, INC., d/b/a
TRAVEL CENTERS OF AMERICA,
FOUR RIVERS GAMING, INC., *et al.*,

Petitioners,

v.

STATE OF LOUISIANA,
through Honorable Richard P. Ieyoub,
Attorney General, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The First Circuit Court Of Appeal
State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

JOHN HOUSAN FENNER, III
1212 South Acadian
Thruway
Baton Rouge, LA 70808
(225) 343-1214

PAUL R. BAIER
4222 Hyacinth St.
Baton Rouge, LA 70808
(225) 344-9815
Counsel of Record

FRANK D. BLACKBURN
5937 Jones Creek Road
Baton Rouge, LA 70808
(225) 756-9696

HILLAR C. MOORE, III
6513 Perkins Road
Baton Rouge, LA 70817
(225) 757-0100

28 October 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. In a federal civil rights suit brought under 42 U.S.C. § 1983 challenging the results of a referendum election for structural, First Amendment violations in the election process, what standards govern waiver or "deliberate by-pass" of First Amendment claims for failure to seek pre-election injunctive relief?

2. Whether the finding of "deliberate by-pass" by the Louisiana First Circuit Court of Appeal below conflicts with the decision of this Court in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and with the decision of the United States Court of Appeals for the Fifth Circuit in *Toney v. White*, 488 F.2d 310 (5th Cir. 1973)?

3. Whether the First Circuit's deliberate by-pass of its own decision in *Perez v. Edwards*, 336 So.2d 1073 (La. App. 1st Cir. 1976), which holds pre-election relief is premature and that constitutional challenges can be brought after the election, denies petitioners a meaningful opportunity to be heard on their First Amendment remedial claim in violation of due process?

LIST OF PARTIES

Petitioners: Premier Games, Inc., through Gerald D. Goudeau, Jr.; Gerald D. Goudeau, Jr.; Chrystolith, L.L.C., d/b/a "76 Truck Stop"; Lee Young; Bayou State Video, Inc.; Richard Ross; Seabuckle Gaming, Inc.; Claud M. Penn, Jr.; A.M.C. Gaming Co.; Jerry Scarlato; Drek Gaming, Inc.; David L. Craighead; Nitro Gaming, Inc.; Harold L. Rosbottom, Jr.

Intervenors/Petitioners: Slidell 76 Travel Centers, Inc., d/b/a Travel Centers of America; Four Rivers Gaming, Inc.

Parent Companies and Subsidiaries: None.

Respondents: State of Louisiana, through Honorable Richard P. Ieyoub, Attorney General, in his official and individual capacity; Honorable Hunt Downer, Speaker of the Louisiana House of Representatives, in his official and individual capacity; Honorable Randy Ewing, President of the Louisiana Senate, in his official and individual capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Premier Games, Inc., through Gerald D. Goudeau, Jr., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeal, State of Louisiana, No. 99-CA-1297, entered in this matter on June 7, 1999.

OPINIONS BELOW

The June 7, 1999 opinion of the First Circuit Court of Appeal is unreported to date and is reprinted herein, Appendix, 1a, *infra*. The May 20, 1999 oral reasons for judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, are unreported and appear herein, 10a, *infra*. The June 2, 1999 written reasons for judgment of the same trial court are unreported and appear herein, 13a, *infra*. The May 24, 1999 judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, appears herein, 21a, *infra*.

JURISDICTION

The judgment of the Louisiana First Circuit Court of Appeal was entered on June 7, 1999. The Louisiana Supreme Court denied certiorari on June 14, 1999 (Justice Lemmon would grant and docket), 25a-26a, *infra*. By order dated June 28, 1999, Mr. Justice Scalia denied petitioners' application for stay pending the filing of a petition for certiorari, No. A-1098, 29a, *infra*. An order extending the filing date of the petition to and including

October 29, 1999 was entered by Justice Scalia on September 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, the Due Process Clause of the Fourteenth Amendment, and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is a civil rights suit pursuant to 42 U.S.C. § 1983 for redress of violation of petitioners' First Amendment rights. It is the remedial sequel to the Louisiana Supreme Court's holding in *Charles A. Brown d/b/a Triambient Lounge & Restaurant v. State of Louisiana*, 96-CA-2204 (La. 10/15/96); 680 So.2d 1179, 30a, condemning La. R.S. 27:13(C)(6) as unconstitutional. This statute prohibited petitioners, licensed video poker machine owners and operators, from pooling their money in political action committees to fend off a "NO" vote at local option elections held on November 5, 1996. Following the defeat of the video-poker referendum, petitioners brought a timely suit under the State Election Code, within 30 days of the challenged election, and under 42 U.S.C. § 1983 seeking to nullify the "NO" votes on video poker in 33 Louisiana Parishes. Petitioners' First Amendment remedial claim alleged that the "NO" votes at the challenged referenda were constitutionally tainted by virtue of the Louisiana

Supreme Court's condemnation of La. R.S. 27:13(C)(6), the content-based prohibition of petitioners' freedom to organize and contribute money to political action committees opposed to the repeal by popular referendum on November 5, 1996, of video poker in the parishes at issue. The trial court overruled the State's exception of no cause of action under the State Election Code, but the First Circuit Court of Appeal on supervisory remedial writs reversed, holding that: "The allegations raised by the plaintiffs all concerned alleged infringements on First Amendment rights almost three weeks prior to the election. Therefore, no allegations concern irregularities or fraud in the 'conduct of an election' that would have otherwise have resulted in a different outcome." 97 CW 2331 (La. App. 1st Cir. 10/31/97), 48a, *infra*. The Louisiana Supreme Court denied plaintiffs' application for supervisory writs. 97 CC 2786 (La. 1/30/98), 709 So.2d 707, 50a, *infra*.

Following trial on the merits of petitioners' remaining First Amendment claim under 42 U.S.C. § 1983, the trial court entered a declaratory judgment, 21a, *infra*, finding that the unconstitutional statute directly caused petitioners' injury, *viz.*, the loss of the referendum votes on Proposition "C" in each of the 33 "NO" parishes at issue. These elections were held null and void. 24a, *infra*. The Louisiana First Circuit Court of Appeal reversed on the sole legal ground that petitioners' failure to file for pre-election injunctive relief was a "deliberate by-pass" negating any cause of action under § 1983. 8a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeal's decision holding that petitioners' failure to file for pre-election injunctive relief

kills their § 1983 claim is surprisingly inconsistent with its own previous published opinion in *Perez v. Edwards*, 336 So.2d 1072, 1073 (La. App. 1st Cir. 1976), *writ refused*, 377 So.2d 872 (La. 1976), *viz.*: "No irreparable injury will occur if the election is allowed to proceed for if the statute calling the election is unconstitutional as plaintiff contends, *its validity can be challenged just as well after the election*." (Our emphasis.) In *Perez*, plaintiff's pre-election constitutional challenge was dismissed by the First Circuit as premature. If there was any "deliberate by-pass," it was the doing of the First Circuit's published opinion in *Perez*, and to invoke it after the fact so as to bar consideration on the merits of petitioners' First Amendment remedial claim denies petitioners due process of law in violation of the Fourteenth Amendment. *Brinkerhoff-Farris Co. v. Hill*, 281 U.S. 673 (1930) (per Mr. Justice Brandeis).

Petitioners reasonably relied on the First Circuit's published ruling in *Perez*, taking the First Circuit at its published word. Premier Games timely filed its suit under Louisiana's Election Code, as well as under 42 U.S.C. § 1983. Nothing in Louisiana's statutes or in Louisiana jurisprudence[1] required petitioners to file for pre-

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[1] In *Graham v. Jones*, 3 So.2d 761, 781 (La. 1941), the Louisiana Supreme Court held that a "party is not estopped to insist upon his constitutional rights by waiting until a law is passed or a regulation is made." Indeed, the situation in *Graham* fairly resonates with this case. The Court quite emphatically rejected the:

> contention that respondents should have urged their complaint to the validity of the proposed amendment prior to the time of its submission, and not having

election injunctive relief, and the First Circuit Court of Appeals invocation of *Toney v. White*, 488 F.2d 310 (5th Cir. 1973) (en banc), is inconsistent with the prescription period set forth in Louisiana's Election Code and inconsistent with *Cipriano v. City of Houma*, 395 U.S. 701 (1969), in which the same argument accepted by the Court of Appeal below was rejected by this Court.

The surprising procedural barricade erected by the Court of Appeal is certworthy on both fundamental due process and constitutional remedial grounds, *viz.*: "As there was no warning of such a course, so also there was no consent to it. We do not presume acquiesence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 307 (1937) (per Cardozo, J.). "The very

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> done so, it is too late for them to complain after the amendment has become effective by the vote of the people. But respondents could not know in advance that the proposed amendment would be approved. . . . **An estoppel may not be invoked to validate a proceeding which is invalid per se.** By merely remaining passive for a few months after its adoption and promulgation, respondents did not estop themselves from maintaining an action to contest the validity of the proposed amendment.

Id. (our emphasis).

This Court's decisions are in accord. See *Abie State Bank v. Bryan*, 282 U.S. 765, 776 (1931) (per Hughes, C.J.) ("[W]e should not be justified in refusing appropriate relief on the theory that the conduct of the banks, in their endeavor to do business under the law and to make the best of the State's policy embodied in it, estopped them from asserting constitutional right."). See also *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988) (delay of six years prior to filing suit did not estop assertion of constitutional rights).

essence of civil liberty certainly consists in the right of every individual to claim the protection of the law, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 1 Cranch 137, 163 (1803), quoted in *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc.*, 403 U.S. 388, 397 (1971).

2. The trial court was plainly correct in rejecting the State's argument that petitioners' failure to file for pre-election injunctive relief bars their § 1983 civil rights action *in state court, viz.*: "the State cites no statute, and the Court has found no Louisiana law, that requires Plaintiffs to seek an injunction prior to an election in order to later preserve their rights to relief. The State cites no controlling authority requiring pre-election injunctions in this type of litigation." Written Reasons for Judgment, 6/2/99, 18a, *infra*. Indeed, it was petitioners' position at the trial in this case, upon advice of counsel, that any pre-election injunctive challenge to the November 5, 1996 referendum would be premature. Record on Appeal, pp. 454-455 [hereinafter "R. ___"] (Bret Sultzer, Esq.); R. 500 (Gerald D. Goudeau, Jr.). The First Circuit itself so held in *Perez v. Edwards*.

3. The First Circuit misapplies *Toney v. White*, 488 F.2d 310 (5th Cir. 1973), in holding that petitioners' failure to file a pre-election suit is an absolute bar to post-election judicial challenge. "This reasoning is sound in the abstract but it must be applied to the facts and circumstances in the particular case. *Id.* at 314. Indeed, in *Toney v. White*, the constitutional flaw, "even if known before the election, was discovered at a late hour," to wit: "within a thirty day period immediately prior to the

election." *Id.*, at 311. Here only seventeen days remained between the Louisiana Supreme Court's denial of rehearing in *Charles Brown* and the November 5, 1996 election. "Paying full respect to the state court's opinion, it seems to us crystal clear that the rule invoked by it cannot reasonably be deemed applicable to this case." *NAACP v. Alabama*, 377 U.S. 288, 296 (1964). "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *Id.*, at 297. "Estoppel in equity must rest on substantial grounds of prejudice and change of position, not on technicalities." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 323 (1936) (Hughes, C.J.). And more: "To this general rule, there are, of course, exceptions arising out of *a lack of opportunity* for one reason or another to seek pre-election relief." *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (emphasis added). So too, the Louisiana First Circuit overlooks the qualification of *Hart v. King*, 470 F.Supp. 1195, 1198 (D. Hawaii 1979), that is, "where by the nature of the case [petitioners] had no opportunity to seek pre-election relief." And in *Tucker v. Burford*, 603 F.Supp. 276, 278 (N.D. Miss. 1985), the court expressly repudiated any argument that failure to file for pre-election injunctive relief is fatal, *viz.*:

> the defendant incorrectly asserts that the seeking of pre-election relief is mandatory before a court may void an election and order a special election. The court must consider the failure of the plaintiffs to seek pre-election relief in view of all the facts and circumstances of the case, including whether pre-election relief was available. Furthermore, *the defendants have a heavy*

> *burden of showing that the plaintiffs deliberately by-passed pre-election relief.* (Our emphasis; citations omitted.)

The facts and circumstances of record in Premier Games's suit indicate that any frantic rush to court after the Louisiana Supreme Court's denial of rehearing in the seventeen remaining days prior to the November 5, 1996 referendum election would have been futile. Cf., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) ("This proved too short a period of time for appellants to obtain complete judicial review . . . . Furthermore, a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively."). Any effort on the part of Premier Games to enjoin the election prior to the state Supreme Court's October 18 denial of rehearing would likely have been fruitless, especially given the controlling authority of *Perez v. Edwards*. "[A]dequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek such relief." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180 (9th Cir. 1988), citing *United States v. City of Cambridge*, 799 F.2d 137, 141-42 (4th Cir. 1986).

If candidates of the American Independent party who complained of an unconstitutional inability to get on the ballot in Arizona could not secure a pre-election § 1983 injunction from Mr. Justice Douglas, a zealous First Amendment sword, because only *eighteen days* remained before the election, it is quite fantastic to suggest that Premier Games should have rushed to state court in

seventeen days to secure the same relief previously held unavailable in *Perez v. Edwards*.

Here is what Justice Douglas said in *Westerman v. Nelson, Attorney General of Arizona*, 409 U.S. 1236-1237 (1972): "The complaint may have merit. But the time element is now short and the ponderous Arizona election machinery is already under way, printing the ballots." Under Louisiana law, La. R.S. 18:1300(A)(1), ballots for the special proposition election on November 5, 1996 must have been printed and in the hands of election officials "At least twenty-two days," La. R.S. 18:552, before the election. And more from Douglas, J.:

> On the basis of these papers I have concluded that in fairness to the parties I must deny the injunction, not because the cause lacks merit but orderly election processes would likely be disrupted by so late an action. The time element has plagued many of these election cases; but one in my position cannot give relief in a responsible way when the application is made as tardy as this one.

409 U.S., at 1236-1237. The reasoning of the First Circuit Court of Appeal in *Perez v. Edwards* is identical: "The protection of plaintiff's individual right to have his name on the ballot at this time is far outweighed by the chaos which would occur by our enjoining the election at this late date." 336 So.2d, at 1073. Surely it is fundamentally unfair for the First Circuit Court of Appeal to fault Premier Games for not seeking pre-election injunctive relief when the First Circuit itself refused such relief in its published *Perez* decision. The First Circuit's flip-flop is an "extreme application," *Richards v. Jefferson County*, 517

U.S. 793, 804 (1996), of *federal-law*, deliberate by-pass principles depriving petitioners of a meaningful opportunity to protect their First Amendment rights. This violates due process. *Brinkerhoff-Farris Co. v. Hill*, 281 U.S. 673 (1930) (per Mr. Justice Brandeis).

As a practical matter, "Courts are not always capable of resolving election disputes swiftly. Many wrongful acts or irregular events occurring either on or close to election day may be impossible to remedy before the election is over." Developments – Election Law, 88 Harv. L. Rev. 1111, 1300 (1975). Moreover, Attorney Bret Sultzer's advice to the machine owners and operators below, that a pre-election suit would be held premature, is precisely what the First Circuit held in *Perez v. Edwards*, 336 So.2d, at 1073: "No irreparable injury will occur if the election is allowed to proceed for if the statute calling the election is unconstitutional as plaintiff contends, *its validity can be challenged just as well after the election*." (Our emphasis.) The First Circuit, take note, says not a word about its own ruling in *Perez* in its opinion in this *Premier Games* case.

4. The most serious misstatement, or rather omission of vital legal detail, is the First Circuit's recital, 5a, of *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In point of actual fact, counsel for Cipriano, Kenneth Watkins, Esq., of Houma, informed this Court:

> The application of plaintiff further sought a Judgment declaring the aformentioned provisions of the Constitution and statutes of the State of Louisiana to be void and repugnant to the same clauses of the Fourteenth Amendment *and particularly declaring void an election* held by

> the City of Houma, Louisiana, on October 24, 1967, pursuant to the aforementioned constitutional and statutory provisions of the State of Louisiana.

Cipriano v. City of Houma, No. 705, Oct. Term 1968, Brief for the Appellant, p. 2 (our emphasis). Thus, Cipriano asked that the election, as well as the bonds, be declared void.

And what was the City of Houma's reply? Amazingly, it was precisely the same claim state defendants and the First Circuit make in this *Premier Games* case thirty years later! – that is, Cipriano should have filed for pre-election injunctive relief. "If injunctive relief was the real purpose of plaintiffs' suit, *he should have instituted such action prior to the date*" on which the election was held. *Id.*, Brief for Defendants-Appellees, p. 9 (our emphasis).

At the trial before the three-judge federal court, which included Circuit Judge John Minor Wisdom and District Court Judges Alvin Rubin and James Comiskey, Joseph Q. Cipriano was asked by State counsel, E. E. Huppenbauer, Jr., Esq.:

> Q. If you feel you have been deprived of your right to vote, why did you wait until 55 days after the election to seek issuance of this injunction?
>
> MR. WATKINS:
>
> If your Honor please, I wish to object on behalf of the plaintiffs. It's immaterial and irrelevant in as much as the statute authorizes 60 days, and as long as the man is waiting within

the period prescribed by law, it's irrelevant how long he waits.

JUDGE WISDOM:

We will allow the witness to answer.

THE WITNESS:

I was hopeful actually, that the – this particular bond issue would be defeated.

BY MR. HUPPENBAUER:

Q. Why then did you wait 55 days?

A. What's that, sir?

Q. Why then did you wait 55 days to institute this action.

A. I would think there's no particular reason in discussing it with Mr. Watkins this time element came about as a matter of my consultation with him.

JUDGE WISDOM:

Let's not linger too long, after all, he could have waited 60 days.

Cipriano v. City of Houma, No. 705, Oct. Term 1968, Appendix to the Jurisdictional Statement, p. 120 (Transcript of Trial Proceedings) (our emphasis). That was the end of the matter at the trial court. Judge Wisdom, as usual, hit the nail right on the head. His answer is our answer to the First Circuit here.

And what did this Court say about the supposed bar of failure to file for § 1983 pre-election injunctive relief? The Court voided the fruits of the unconstitutional election, the bonds in question, adding:

> "[W]e will apply our decision in this case prospectively. That is, we will apply it only where, *under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final.*"

Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (our emphasis). As in *Cipriano*, Premier Games brought its suit here within the time specified by state law for challenging the November 5, 1996 election. Its case is certainly not yet final.

Cipriano was a 42 U.S.C. § 1983 federal civil rights action for violation of Fourteenth Amendment rights. The tainted revenue bonds in *Cipriano* were nullified. The present case is likewise a 1983 action for violation of the First Amendment rights of petitioners, and the trial court below has properly nullified the fruits of the tainted November 5, 1995 referendum election as "void ab initio." 12a, 13a, *infra*.

Contrary to the First Circuit's reading, *Cipriano* plainly indicates that Premier Games' § 1983 suit is not barred under 42 U.S.C. § 1983, as it was filed *within the time specified by state law for challenging the election*. The First Circuit's decision in this Premier Games case is not only inconsistent with its own previously published ruling in *Perez v. Edwards*, but, more importantly here, in conflict with this Court's opinion in *Cipriano v. City of Houma*.

Cipriano's controlling § 1983 pronouncement and *Toney v. White*, properly applied, require rejection of defendants' plea in bar, accepted by the First Circuit

Court of Appeal below, that petitioners should have filed for pre-election injunctive relief.

5. Premier Games is entitled to take the First Circuit at its *Perez* word. For the First Circuit now to reverse its reported course and hold that Premier Games' failure to file for pre-election injunctive relief bars judicial consideration on the merits of its vital First Amendment claim denies Premier Games an opportunity to be heard to which it is constitutionally entitled. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is afforded to him some real opportunity to protect it." *Brinkerhoff-Farris Co. v. Hill*, 281 U.S. 673, 682 (1930) (per Mr. Justice Brandeis), quoted in *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996).

CONCLUSION

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. *There is a presumption against waiver of constitutional rights . . . .* " *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added). "Where the ultimate effect of sustaining a claim of waiver might be an imposition on [First Amendment rights], we are unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co. v. Butts*, 388 U.S.

130, 145 (1967). "For a waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972). These standards, we submit, were breached by the Louisiana First Circuit Court of Appeal. The question of waiver or "deliberate by-pass" of petitioners' First Amendment rights by their failure to seek pre-election injunctive relief is an important question of federal law that has not been, but should be, addressed by this Court.

The trial court below clearly found that petitioners' First Amendment rights had been violated and that the contested "NO" votes on video-poker were directly linked to the unconstitutional violation, 15a, 19a, 22a-23a, *infra*. Cf., *Anderson v. Celebrezze*, 460 U.S. 780 (1983): "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we have observed in another First Amendment context, it is often true 'that the best means to that end is to open the channels of communication rather than to close them.' " 460 U.S., at 798, quoting *Virginia Pharmacy Board v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Cf., *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, No. 98-387, ___ U.S. ___, 119 S.Ct. 1923 (6/14/99). Permitting the tainted no vote to take effect[2] perpetuates the violation of petitioners' First Amendment rights, whereas nullification of the referendum elections in the

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[2] Petitioners' video poker machines were disconnected in the 33 "NO" parishes on June 30, 1999, pursuant to La. R.S. 18:1300.21(D).

circumstances found by the trial court is well within the trial court's § 1983 remedial discretion. "Federal courts will enter orders invalidating state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms." *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (per Anthony M. Kennedy, J., now Mr. Justice Kennedy).

And more:

> reserving the invalidation remedy to instances in which the election outcome might be affected by illegality strikes a more reasoned balance between competing interests in most cases. Under this approach, a new contest is warranted only when illegal acts might skew the election returns sufficiently so as to influence the outcome, although, consistent with equity's approach, countervailing considerations may induce the chancellor to stay his hand. In any event, absent compelling circumstances to the contrary, granting a federal imprimatur to such results would be an indefensible abdication of the federal judicial responsibility to guard constitutional rights.

Kenneth W. Starr, Federal Judicial Invalidation as a Remedy for Irregularities in State Elections, 49 N.Y.U.L. Rev. 1092, 1128 (1974). "Ordering a new election only *when the results of the prior one are suspicious* comports with the duties of federal courts both to sit as tribunals of equity, balancing competing considerations, and to serve as the

principal protectors of constitutionally guaranteed rights." *Id.*, p. 1129 (our emphasis).

Respectfully, the State of Louisiana has no more legitimate interest in perpetuating the direct result of its unconstitutional video-poker "NO" elections than the City of Houma had in collecting revenue on its tainted bonds. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

PAUL R. BAIER
4222 Hyacinth St.
Baton Rouge, LA 70808
(225) 344-9815
Counsel of Record

HILLAR C. MOORE, III
6513 Perkins Road
Baton Rouge, LA 70817
(225) 757-0100

JOHN HOUSAN FENNER, III
1212 South Acadian Thruway
Baton Rouge, LA 70808
(225) 343-1214

FRANK D. BLACKBURN
5937 Jones Creek Road
Baton Rouge, LA 70817
(225) 756-9696

28 October 1999

No. _____

In The
SUPREME COURT OF THE UNITED STATES

PREMIER GAMES, INC.,
through Gerald D. Goudeau, Jr.;
SLIDELL 76 TRAVEL CERNTERS, INC., d/b/a/
TRAVEL CENTERS OF AMERICA;
FOUR RIVERS GAMING, INC., *et al.*,

Petitioners,

v.

STATE OF LOUISIANA,
through Honorable Richard P. Ieyoub,
Attorney General, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The First Circuit Court Of Appeal
State Of Louisiana

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 99 CA 1297

PREMIER GAMES, INC. THROUGH GERALD D. GOUDEAU, JR. PRESIDENT; GERALD D. GOUDEAU, JR., INDIVIDUALLY; CHRYSOLITH, L.L.C. THROUGH LEE YOUNG; LEE YOUNG, INDIVIDUALLY; BAYOU STATE VIDEO, INDIVIDUALLY THROUGH RICHARD D. ROSS, PRESIDENT; AND RICHARD ROSS, INDIVIDUALLY

VERSUS

STATE OF LOUISIANA, THROUGH HONORABLE RICHARD B. IEYOUB, ATTORNEY GENERAL; HONORABLE W. FOX MCKEITHEN, SECRETARY OF STATE, STATE OF LOUISIANA; HONORABLE HUNT DOWNER, SPEAKER OF THE HOUSE OF REPRESENTATIVES; HONORABLE RANDY EWING, PRESIDENT, LOUISIANA SENATE

Judgment Rendered: JUN 07 1999

* * *

On Appeal from the
Nineteenth Judicial District Court,
in and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 434,700

Honorable Janice Clerk, Judge Presiding

* * *

Hillar C. Moore, III
Paul R. Baier
Baton Rouge, LA

Attorneys for Plaintiffs,
Premier Games, Inc., et al.

Frank D. Blackburn Baton Rouge, LA	Attorney for Intervenor, Four River Gaming
John H. Fenner, III Baton Rouge, LA	Attorney for Intervenor, Slidell 76 Travel Center
Robert B. Barbor David G. Sanders Angie R. LaPlace Baton Rouge, LA	Attorneys for Defendant, State of Louisiana

* * *

BEFORE: CARTER, C.J., LEBLANC, FOGG, PARRO, AND PETTIGREW, JJ.

PER CURIAM.

This appeal presents the question of whether the trial court erred in nullifying the November 5, 1996 elections in the parishes which voted to reject video poker.

The parties to this appeal are Premier Games, Inc., et al., the original plaintiffs, and the intervenors, Slidell 76 Travel Center, Inc. d/b/a Travel Centers of America, and Four Rivers Gaming, Inc. These parties will collectively be referred to as the plaintiffs. The defendants in this matter are the State of Louisiana, through Richard Ieyoub, Attorney General; W. Fox McKeithen, Secretary of State; Hunt Downer, Speaker of the Louisiana House of Representatives; and Randy Ewing, President of the Louisiana Senate.

By judgment dated May 24, 1999, the trial court found that because LSA-R.S. 27:13C(6) violated the plaintiffs' rights of free association under the First Amendment of the United States Constitution, the referendum elections on video poker held on November 5, 1996, were

constitutionally tainted. As a result, the trial court declared the election null and void in 30 of the 33 parishes which rejected video poker.[1] The parties sought an expedited appeal directly to the Louisiana Supreme Court; however, pursuant to an order of the supreme court dated May 26, 1999, the appeal was remanded to this court.

Previously, this court exercised its supervisory jurisdiction and granted an exception of no cause of action in **Premier Games, Inc. v. State of Louisiana,** 97-2231 (La. App. 1st Cir. 10/31/97) (unpublished writ); *writ denied,* 97-2786 (La. 1/30/98); 708 So.2d 707, which dismissed the election contest portion of this suit concerning the nullification of the November 5, 1996 election. In granting the writ, this court found the petition failed to allege that, except for irregularities or fraud in the conduct of an election, the result would have been different. That decision is now final; therefore, there is no viable action under the Election Code, LSA-R.S. 18:1401 et seq.

What this case involves is an attempt to seek redress for alleged constitutional violations under 42 U.S.C. §1983 and the First Amendment to the United States Constitution. The plaintiffs assert that the "NO" votes on

---

[1] The trial court's judgment specifies the following parishes: Allen, Ascension, Beauregard, Bienville, Caldwell, Catahoula, Claiborne, Concordia, East Baton Rouge, East Feliciana, Evangeline, Franklin, Iberia, Jackson, Lafayette, LaSalle, Lincoln, Livingston, Morehouse, Natchitoches, Ouachita, Rapides, Richland, Sabine, St. Tammany, Tangipahoa, Union, Vermillion, Vernon, and Winn. Pursuant to a joint stipulation, the parties agreed the judgment was to include all 33 parishes which rejected video poker.

the challenged referenda in the 33 parishes that rejected video poker are constitutionally tainted by the declaration that LSA-R.S. 27:13C(6), was unconstitutional. The statute was the content-based prohibition of plaintiff's freedom to organize and contribute money to political action committees (PACs) opposed to the repeal of video poker. *See* **Charles A. Brown d/b/a Triambient Lounge & Restaurant v. State of Louisiana,** 96-2204 (La. 10/15/96); 680 So.2d 1179.

According to the plaintiffs, "[t]he only question remaining is whether the plaintiffs have averred and can prove an 'actionable causal relationship' between R.S. 27:13C(6) and their asserted injury." To determine the propriety of the trial court's ruling, we must consider the relevant language of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, . . . of any State . . . subjects, or even causes to be subjected, any citizen of the United States . . . to the **deprivation of any rights,** privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Emphasis ours.)

We focus our attention on which rights were deprived and what injury was suffered. The trial court ruled that the injury resulting from the deprivation of plaintiffs' First Amendment rights of free association was the rejection of video poker in 33 parishes. We disagree.

The injury suffered was not the tainting of the referenda, but rather the deprivation of the right of free association, i.e., the prohibition against the formation of PACs supporting video poker. We note this deprivation was

cured 17 days prior to the election. However, we make no finding regarding the adequacy of the 17-day time period. Instead, we must determine whether the remedy granted by the trial court was the appropriate remedy for the deprivation of the plaintiffs' rights of free association.

The plaintiffs' reliance on the cases of **Hadnott v. Amos,** 394 U.S. 358, 364, 89 S.Ct. 1101 (1969); **Cipriano v. City of Houma,** 395 U.S 701, 89 S.Ct. 1897 (1969); and **Phoenix v. Kolodziejski,** 399 U.S. 204, 90 S.Ct. 1990 (1969), to support their contention that the November 5, 1996 election can be overturned due to constitutional infirmities, is misplaced. First, **Hadnott** arose in the context of the Voting Rights Act of 1965, which is not an issue in the instant case. Also, **Hadnott** specifically involved a situation where candidates were completely denied an opportunity to be included on the ballot. The **Cipriano** and **Phoenix** decisions addressed situations where an identifiable class of voters was denied the opportunity to vote on a particular issue. In the case before the court, we are not presented with any type of denial of a class of voters to vote on a particular issue, denial of the right to vote, denial of the right to seek elective office, or failure to include an issue on the ballot. We further note that the cases cited by the plaintiffs do not involve any judicial determination prior to the elections that rights had been violated. In the present case, there was a judicial determination issued 17 days prior to the election that the plaintiffs' rights had been violated. *See* **Brown,** 680 So.2d 1179.

Compensatory damages and injunctions are remedies clearly available under 42 U.S.C. §1983 if timely asserted. However, all parties agree that compensatory damages

are not at issue in the present case. As Plaintiffs note in their brief to this court, "[a] declaratory judgment can be granted under section 1983, as a variety of equitable remedies. Injunctive relief is frequently granted", *citing* Charles Allen Wright, Arthur R. Miller, Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1984), vol. 13B, section 3573.2, pp. 218-219.

Since there is no existing action under the Election Code, the Voting Rights act of 1965 is not involved, and there are no allegations that voters were denied the right to vote or to run for office or that the issue at hand was not properly presented on the ballot, we must reverse the trial court's nullification of this election.

The nullification of an election has been described as a "drastic, if not staggering" remedy. **Cook v. Luckett,** 735 F.2d 912, 921-22 (5th Cir. 1984). We decline to impose such an extreme remedy when the plaintiffs had the opportunity to seek judicial relief through injunction for their deprivation of the right to free association prior to the election. The plaintiffs had 17 days to seek an injunction of the election and chose not to do so. The trial court attempted to validate plaintiffs' inaction by stating there was no law requiring the plaintiffs to seek an injunction prior to the election in order to later preserve their rights to relief. This conclusion of the trial court ignores the elementary principle behind the judicial remedy of an injunction, i.e., that injunctions are ineffective after the act sought to be enjoined has taken place.

To obtain a preliminary injunction, the first showing a party must make is that the injury, loss, or damage he

will suffer if the injunction does not issue may be irreparable. **State, through Louisiana State Board of Examiners of Psychologist of Department of Health and Human Services v. Atterberry,** 95-0391, p.5 (La. App. 1st Cir. 11/9/95); 664 So.2d 1216, 1220. When First Amendment rights are implicated, irreparable injury is presumed for purposes of determining the appropriateness of injunctive relief under 42 U.S.C. §1983. *See* **Donrey Media Group v. Ikeda,** 959 F. Supp. 1280, 1287 (D. Hawaii 1996). It is also incumbent on the party to show he is entitled to the relief sought and that he will likely prevail on the merits of the case. **State, through Board of Examiners,** 664 So.2d at 1220.

We are faced with the lack of any attempt to seek judicial relief under 42 U.S.C. §1983 prior to the election. As the record reflects, the plaintiffs determined that a "public relations disaster" would have ensued had they attempted to enjoin the November 5, 1996 election. Ironically, the plaintiffs decided to gamble on the election to determine how many parishes would approve video poker and then seek judicial relief for the parishes voting to reject video poker after the election. Such an example of the failure to seek judicial relief prior to the election is precisely what the United States Fifth Circuit Court of Appeal rejected in the decision of **Toney v. White,** 488 F.2d 310, 314 (5th Cir. 1973) (*en banc*) by stating:

> We agree . . . that the law imposes the duty on parties having grievances based on discriminatory practices to bring the grievances forward for pre-election adjudication. We also agree that the failure to require prompt pre-election action in such circumstances as a prerequisite to post-

> election relief may permit, if not encourage parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action. (Internal quotations omitted.)

The facts in the case before this court indicate there was a deliberate by-pass of pre-election relief.

We agree with the State's interpretation and its cited authorities that it was incumbent upon plaintiffs to diligently seek pre-election judicial relief as a prerequisite to voiding an election due to constitutional violations, especially when they had the opportunity to seek relief. The plaintiffs now have no remedy available to them because of their failure to seek pre-election relief; therefore, the plaintiffs do not have a cause of action.

LSA-C.C.P. art. 934 provides:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.

Amendment of the petition is not permitted when it would constitute a vain and useless act. **Doe v. Entergy Services, Inc.**, 608 So.2d 684, 687 (La. App. 4th Cir. 1992), *writ denied*, 613 So.2d 978 (La. 1993), *certiorari denied*, 510 U.S. 816, 114 S.Ct. 66 (1993). Because there is no remedy available to the plaintiffs, amendment of their petition

would be a vain and useless act. Therefore, because the grounds of the objection cannot be removed, we will not delay this matter for an attempt to amend the petition.[2]

Accordingly, the judgment of the trial court denying the peremptory exception of no cause of action filed by the State is hereby reversed, the peremptory exception of no cause of action is granted, and this matter is dismissed at plaintiffs' cost.

REVERSED AND RENDERED.

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[2] We note that in considering this very important case, this court, as well as counsel for all parties involved, unfortunately are operating under severe time constraints. Accordingly, in all aspects, our handling of this matter has been conducted as expeditiously as possible.

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DIVISION D

PREMIER GAMES, ET AL.

V. SUIT NO. 434-700

STATE OF LOUISIANA, ET AL.

THURSDAY, MAY 20, 1999
TRIAL ON THE MERITS
THE HONORABLE JANICE CLARK, JUDGE PRESIDING

APPEARANCES:

HILLAR C. MOORE AND PAUL BAIER : PLAINTIFFS
DAVID SANDERS AND ANGIE LAPLACE : DEFENDANTS
JOHN FENNER : SLIDELL 76 TRAVEL CENTER, INC., D/B/A/ TRAVEL CENTERS OF AMERICA
FRANK BLACKBURN : FOUR RIVERS GAMING, INC. & HEIR

* * *

REPORTED BY: DIANE DIDIER, CCR

[p. 257] **ORAL REASONS FOR JUDGMENT**

THE COURT: THANK YOU VERY MUCH. LET THE COURT TAKE THIS OPPORTUNITY TO THANK COUNSEL FOR THE WELL-PREPARED BRIEFS, TRIAL MEMORANDUMS, THE EXCELLENT WAY IN WHICH THE EXHIBITS WERE ORGANIZED AND SUBMITTED INTO EVIDENCE, THE PROFESSIONAL WAY THIS CONTENTIOUS ISSUE WAS HANDLED BY AND BETWEEN COUNSEL. AND, YES, THIS IS AN IMPORTANT CASE.

THIS INVOLVES THE VERY FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. AND INDEED, THIS IS AND [sic] ACTION FOR DECLARATORY JUDGMENT AND REMEDIAL RELIEF IN WHICH THE PLAINTIFFS SEEK REDRESS OF THEIR GRIEVANCE FOR VIOLATION OF THEIR FIRST AMENDMENT RIGHTS.

I WOULD LIKE TO QUOTE A PASSAGE FROM PLAINTIFFS' BRIEF, PROFESSOR BAIER, IN WHICH IT SAYS, LEGISLATIVE BARRICADES TO A FULL AND FREE ELECTION ARE COGNIZABLE UNDER CIVIL RIGHTS LAWS, PARTICULARLY THE VOTING RIGHTS ACT OF 1965 AND UNDER 1983. THUS, THE SUPREME COURT OF THE UNITED STATES HAS ANNULLED AN ELECTION WHERE LEGISLATIVE RESTRICTIONS UNCONSTITUTIONALLY ABRIDGE FIRST AMENDMENT RIGHTS, WHICH INCLUDE THE RIGHT TO BAND TOGETHER FOR THE ADVANCEMENT OF POLICITAL BELIEFS. SEE **HADNOTT VERSUS AMOS, SECRETARY OF STATE OF ALABAMA**.

THIS COURT FINDS THAT IN A 1983 ACTION, SUCH AS THE CASE AT BAR, THE PLAINTIFFS MUST ESTABLISH BY A PRIMA FACIE SHOWING THAT THE ACTION THAT OCCURRED UNDER CALL [sic] OF STATE LAW, AND THEY HAVE, AND THAT THE ACTION IS A DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND THEY LIKEWISE HAVE [p. 258] SUSTAINED THAT BURDEN; MOREOVER, THE PLAINTIFFS HAVE PROVED THAT THAT UNCONSTITUTIONALITY WAS INDEED A SUBSTANTIAL FACTOR IN THE DEFEAT OF THE REFERENDA ELECTION IN THE PARISHES AT ISSUE. AND ALTHOUGH THERE IS

SOME ARGUMENT AS TO WHETHER OR NOT THE BURDEN SHIFTS TO THE DEFENDANT AT THIS JUNCTURE, IT MATTERS IN THE VERY LEAST, BECAUSE THE PLAINTIFFS HAVE GONE BEYOND THEIR STANDARD OF PROOF.

THIS COURT IS OF THE OPINION THAT THE VOTERS OF THE SUBJECT PARISHES WERE DENIED THEIR RIGHT TO VOTE AND CAST AN INTELLIGENT, KNOWING, AND MEANINGFUL VOTE. THEREFORE, THIS COURT HOLDS THAT THAT ELECTION WAS NULL AND VOID AB INITIO. JUDGMENT WILL BE SIGNED ACCORDINGLY.

MR. BAIER: THANK, YOUR HONOR.

MR. FENNER: YOUR HONOR, I PREPARED A JUDGMENT.

THE COURT: COURT WOULD LIKE TO PREPARE WRITTEN REASONS, WHICH WILL FOLLOW WITHIN THE NEXT DAY OR SO. COURT WILL STAND AT RECESS.

* * *

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PREMIER GAMES, INC., THROUGH GERALD D. GOUDEAU, JR., *et al.*,

Plaintiffs;

SLIDELL 76 TRAVEL CENTER, INC. d/b/a TRAVEL CENTERS OF AMERICA,

Plaintiffs in Intervention;

FOUR RIVERS GAMING, INC., FREDERICK W. HEIN,

Plaintiffs in Intervention.

VERSUS

THE STATE OF LOUISIANA THROUGH THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, *et al.*,

Defendants

DOCKET NO: 434,700

DIVISION: "D"

JUDGMENT

(Filed May 24, 1999)

This matter came on for hearing before this Honorable Court for a bench trial on the 20th day of May, 1999. Present in Court were Hillar C. Moore, III and Paul R. Baier, counsel for plaintiffs, Premier Games, *et al.*; John Housan Fenner, III, counsel for plaintiffs in intervention, Slidell 76 Travel Center, Inc.; Frank D. Blackburn, counsel for Four Rivers Gaming, Inc., Frederick W. Hein, plaintiffs in intervention; and Assistant Attorneys General

David G. Sanders and Angie Rogers LaPlace, counsel for the defendants.

Upon considering the evidence adduced at trial, including testimony of witnesses, documentary evidence, and the briefs and arguments of counsel, the Court finds as follows:

1. The petition of plaintiff Premier Games, *et al.*, for declaratory judgment, and the petitions of interveners, Slidell 76 Travel Center, Inc. and Four Rivers Gaming, Inc., Frederick W. Hein state a cause of action for redress of violation of plaintiffs' First Amendment rights pursuant to 42 U.S.C. §§ 1983, 1988.

2. The proofs at trial adduced by plaintiff Premier Games, *et al.* including the overwhelming weight of plaintiff Premier Games' expert witness testimony, which the court finds credible and persuasive, establish a direct causal connection between the "NO" votes at the November 5, 1996 video poker "Proposition C" elections and the unconstitutional statute at issue, R.S. 27:13(C)(6), and regulation thereunder, in the parishes of Allen, Ascension, Beauregard, Bienville, Caldwell, Claiborne, East Baton Rouge, East Feliciana, Evangeline, Franklin, Grant, Iberia, Jackson, Lafayette, LaSalle, Lincoln, Livingston, Morehouse, Natchitoches, Quachita, Rapides, Richland, Sabine, Tangipahoa, Union, Vermillion, Vernon, Washington, West Carroll, and Winn.

3. Plaintiff Premier Games has established by a clear preponderance of evidence, including the overwhelming weight of expert witness testimony, that but for the unconstitutional

prohibition of revised statute 27:13(C)(6) and regulation thereunder, the result in each of the above parishes at issue would have been different, *i.e.* the result in the "Proposition C" video poker election more probably than not would have been "YES".

4. Plaintiff in intervention Slidell 76 has established by a clear preponderance of evidence, including the overwhelming weight of expert witness testimony, that but for the unconstitutional prohibition of revised statute 27:13(C)(6) and regulation thereunder, the result in St. Tammany Parish would have been different, *i.e.* the result in the "Proposition C" video poker election more probably than not would have been "YES".

5. Plaintiff in intervention Four Rivers Gaming, Frederick W. Hein has established by a clear preponderance of evidence, including the overwhelming weight of expert witness testimony, that but for the unconstitutional prohibition of revised statute 27:13(C)(6) and regulation thereunder, the result in Catahoula and Concordia Parishes would have been different, *i.e.* the result in the "Proposition C" video poker election more probably than not would have been "YES".

6. The Court further finds that defendants' Exception of Latches is without merit on the evidence presented.

WHEREFORE, it is **ADJUDGED, ORDERED, AND DECREED** that defendants' Exception of No Cause of Action is hereby overruled; defendants' Exception of Latches is hereby overruled; defendants' Exception of

Prescription as to Slidell 76 and Four Rivers Gaming, Frederick W. Hein is hereby overruled.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the November 5, 1996 video poker referendum elections in the parishes of Allen, Ascension, Beauregard, Bienville, Caldwell, Catahoula, Claiborne, Concordia, East Baton Rouge, East Feliciana, Evangeline, Franklin, Iberia, Jackson, Lafayette, LaSalle, Lincoln, Livingston, Morehouse, Natchitoches, Quachita, Rapides, Richland, Sabine, St. Tammany, Tangipahoa, Union, Vermillion, Vernon, and Winn are hereby declared null and void.

THUS DONE AND SIGNED this 24th day of May, 1999, in baton Rouge, Louisiana.

I certify that on this day a notice of the judgment was mailed by me, with sufficient postage, affixed, to: all CDR

Illegible and signed on 5-24-99

/s/ E. Knight
Deputy Clerk of Court

/s/ Janice Clark
HONORABLE JANICE CLARK
Judge, 19th
Judicial District Court

PREMIER GAMES, INC., et al VS. THE STATE OF LOUISIANA, et al	NUMBER 434,700 DIV. "D" 19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

****

WRITTEN REASONS FOR JUDGMENT
(Filed June 2, 1999)

****

This matter came on for trial on Thursday, May 20, 1999. Present in court were Hillar C. Moore, III and Paul R. Baier, attorneys for Petitioners; John Fenner, attorney for Petitioners in Intervention; David G. Sanders and Angie Rogers LaPlace, attorneys for Defendants. Upon completion of the presentation of evidence, including testimony, depositions, and other documentary evidence and argument of counsel, the matter was submitted. The Court ruled in open court that the subject election was null and void ab initio. Judgment was submitted and signed containing the Court's findings of fact and conclusions of law. The Court now supplies these written reasons to further explain the basis for decision.

Discussion

Among the most insidious challenges to the American system of ordered liberty are those that carry the appearance of protecting cherished fundamental rights while in fact and in substance assaulting those very rights. This Court has previously observed that the right to vote is the crown jewel in the diadem of American

freedom. Attendant to the right to vote are the right to advocate a position for or against a proposition or candidate and the right of the public to a free flow of information. *Brown v. State of La.*, No. 96-CA-2204, 680 So.2d 1179 (La. 1996). La.R.S.27:13(C)(6), and a rule enacted pursuant hereto, Emergency Rule 107, unconstitutionally prohibited the advocates of video poker, including Plaintiffs, from utilizing the time provided by statute to pool their resources to more effectively communicate their position. Thus, the people of Louisiana were deprived of information that would have allowed the November 5, 1996 elections to be an informed, educated expression of their will.

In *Brown*, at 1183, the Louisiana Supreme Court concluded as follows:

> "R.S. 27:13(C)(6) is clearly unconstitutional under the First Amendment to the U.S. Constitution insofar as it prohibits contributions to committees supporting or opposing ballot measures."

Plaintiffs' evidence established and the Court finds that the unconstitutional statute and rule were a substantial factor in the outcome of the November 5, 1996 elections. Plaintiffs' losses and the opponents' victories are clearly traceable to the unconstitutional statute and rule. From the evidence, it is clear that the outcome of the election would have been different but for the unconstitutional statute and rule.

Plaintiffs and Defendants agreed that in order for Plaintiffs to prevail in an action under 42 U.S.C. Sec. 1983, Plaintiffs must prove that the unconstitutionality of La. R.S. 27:13(C)(6) was a substantial factor in the defeat of

video poker at the November 5, 1996 elections. Plaintiffs exceeded this burden and proved that the unconstitutional statute and rule actually caused the defeat.[1] Therefore, applying pertinent law, this Court found that Plaintiffs stated a claim under 42 U.S.C. Sec. 1983 for which a declaration of nullity of the November 5, 1996 elections should be entered.

At trial, Plaintiffs established that they had an effective plan and the financial means to implement this plan when the Louisiana Gaming Control Board adopted Emergency Rule 107 on August 7, 1996. Emergency Rule 107 terminated Plaintiffs' coordinated efforts to pool their resources to more effectively advocate their positions on the video poker Referenda being held on November 5, 1996. The Louisiana Supreme Court removed this impediment October 17, 1996, just seventeen days before the election, when its declaration became final that La.R.S. 27:13(C)(6) was unconstitutional. Plaintiffs clearly established by expert testimony that seventeen days was not sufficient time to recoordinate their activities, pool their resources, target votes and mount an effective collaborative campaign.

---

[1] There is some dispute over whether the burden of proof switches after Plaintiffs show that the unconstitutional statute was a substantial factor in the election outcome. This dispute is of little consequence where plaintiffs' overwhelming evidence shows the unconstitutional statute actually caused the loss of the election in every parish where video poker lost. Nevertheless, this Court finds that Defendant failed to prove the results would have been unchanged despite the Constitutional violation.

This Court relied heavily on the compelling evidence from Plaintiffs' experts in political analysis. Conversely, Defendant's experts in political analysis were not persuasive. Defendant's experts failed to rebut Plaintiffs' expert evidence about the statute's effect on the fate of the election.

The Court found that the scientific methodology employed by the plaintiffs' experts rises to a high level of creditability and reliability. This expert testimony revealed that political analysts could predict with an 80-85% degree of certainty the outcome of elections by utilizing a system of scientific polling and targeting voters. The analysts testified in person and through deposition that by using scientific methodology, certain voters could be targeted, educated and persuaded to change their position. In *Brown*, the Louisiana Supreme court observed that pooling funds and resources to advocate a position was a constitutionally protected activity.

The Court observes that the political analysts' methods could be used to manipulate unwary voters. However, this methodology is available to be used by both proponents and opponents on any issue. This Court suggests that since times and election practices have changed, politically active groups or individuals should either learn to use these tools or engage professionals with the appropriate expertise to assist them in their advocacy. The Court further suggests that in order to make informed choices and to avoid manipulation, the voting public must become knowledgeable about the sophisticated marketing techniques used in modern elections.

This process, however, requires in most cases both the raising and pooling of large sums of money and the sufficient time to mount a campaign. In the present case, Plaintiffs demonstrated they had the resources and had implemented a plan to educate the public in support of video poker. Depriving Plaintiffs of the right to implement this plan in the time available denied Plaintiffs their First Amendment rights of free speech and free association. This deprivation also denied the voting public the essential right to a free flow of information.

This is not to say political analysts or pundits can dictate the length of political campaigns or that the Legislature could not provide for an election within seventeen days, or shorter, if their wisdom and judgment so dictated. However, all interested parties must be given the same opportunity to utilize the time available between the announcement of an election and the election itself to speak either individually or collectively on a position. In this case, Plaintiffs have proven the illegal statute and rule significantly impinged on their and the public's First Amendment rights. *State v. Schirmer*, No. 93-DA-2631, 646 So.2d 890, at 902 (La. 1994). The November 5, 1996 election must be declared null and void.

Much has been made of whether the video poker vote reflected the will of the people. It is manifestly clear from the evidence at trial that no educated and informed will of the people was formed. Because of the First Amendment infringements there was no targeted media campaign by Plaintiffs and other proponents of video poker. For example, they were not allowed to focus the public's attention on how many of Louisiana's single mothers were employed in the video poker industry or

how much video poker money is being paid in Louisiana taxes to maintain roads or to subsidize law enforcement. As a result, the opponents never needed to counter with coordinated and focused efforts to convince the public of the alleged general evil of gaming including the wasted lives and fortunes it causes. The Plaintiffs were Constitutionally entitled to begin this debate in the targeted and persuasive manner they had begun. The organized media debate never began. As a result, the voting public never received the free flow of information that would have allowed them to discriminately choose between two powerful and divergent points of view.

The State argues that the Plaintiffs have no right of action because they failed to attempt to enjoin the video poker election. However, the State cites no statute, and the Court has found no Louisiana law, that requires Plaintiffs to seek an injunction prior to an election in order to later preserve their rights to relief. The State cites no controlling authority requiring pre-election injunctions in this type of litigation. In the Louisiana civil law system, the court should not create remedies, especially where, as here, the common expenditures and organizations are afforded the "broadest First Amendment protection". *Brown*, at 1182. Moreover, Plaintiff's expert legal and political analysts established that a pre-election injunction attempt not only would have been unsuccessful[2], it

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[2] Plaintiffs' evidence established they probably would have been unsuccessful in attempting to enjoin the election. Plaintiffs's legal experts showed they could prove no tangible damage until after the election was held. An injunction would have, in all probability, been denied.

would have had a devastating effect on the elections. Requiring the Plaintiffs to damage their political position to protect their rights would be another insidious violation of their right to participate in the election free from intimidation, harassment, confusion, obstruction and undue influence. See La.R.S. 18:1462(A).

Conclusion

The Plaintiffs have proven a Constitutionally flawed statute, La.R.S. 27:13(C)(6), directly caused the loss of the November 5, 1996 election on video poker in each parish where the proposition failed. Further, The Plaintiffs have proven that the public's right to the free flow of information has also been impinged to the extent that the public was deprived of information needed to base a reasoned, informed vote. As Justice Kimball observed in her concurrence in the denial of rehearing in *Brown*, at 1185:

> That statute, insofar as it restricts the ability of certain citizens to engage in the political process by voicing their opinions on a ballot measure, undercuts the very essence of the right of free speech secured by the First Amendment.

Under the facts of this case, the court found a clear violation of 42 U.S.C. Sec. 1983 and, therefore, declared the election on November 5, 1996 to be null and void.

Baton Rouge, Louisiana, this 2nd day of June, 1999.

/s/ Janice Clark
Janice Clark
Judge, Division "D"
19th Judicial District Court

I hereby certify that on this day a notice of the above judgement was mailed by me, with sufficient postage affixed, to: see parties

Done and signed on 6-2-99

/s/ Linda Illegible
Deputy Clerk of Court

The Supreme Court of the State of Louisiana

PREMIER GAMES, INC. THROUGH GERALD D. GOUDEAU, JR., PRESIDENT; GERALD D. GOUDEAU, JR., INDIVIDUALLY; CHRYSOLITH, L.L.C. THROUGH LEE YOUNG; LEE YOUNG, INDIVIDUALLY; BAYOU STATE VIDEO, INDIVIDUALLY THROUGH RICHARD D. ROSS, PRESIDENT; AND RICHARD ROSS, INDIVIDUALLY

VS. **NO. 99-C - 1679**

STATE OF LOUISIANA, THROUGH HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL; HONORABLE W. FOX MCKEITHEN, SECRETARY OF STATE, STATE OF LOUISIANA; HONORABLE HUNT DOWNER, SPEAKER OF THE HOUSE OF REPRESENTATIVES; HONORABLE RANDY EWING, PRESIDENT, LOUISIANA SENATE

IN RE: Premier Games Inc.; Goudeau, Gerald D. Jr.; Chrysolith L.L.C.; Young, Lee; Bayou State Video; Ross, Richard D.; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA99 1297; Parish of East Baton Rouge 19th Judicial District Court Div. "D" Number 434,700

June 14, 1999

Denied.

JTK

PFC

WFM

CDK

JPV

CDT

LEMMON, J. would grant and docket.

JOHNSON, J. not on panel.

Supreme Court of Louisiana
June 14, 1999

/s/ John Tarlton Olivier
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

PREMIER GAMES, INC. THROUGH GERALD D. GOUDEAU, JR., PRESIDENT; GERALD D. GOUDEAU, JR., INDIVIDUALLY; CHRYSOLITH, L.L.C. THROUGH LEE YOUNG; LEE YOUNG, INDIVIDUALLY; BAYOU STATE VIDEO, INDIVIDUALLY THROUGH RICHARD D. ROSS, PRESIDENT; AND RICHARD ROSS, INDIVIDUALLY

VS. **NO. 99-C - 1710**

STATE OF LOUISIANA, THROUGH HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL; HONORABLE W. FOX MCKEITHEN, SECRETARY OF STATE, STATE OF LOUISIANA; HONORABLE HUNT DOWNER, SPEAKER OF THE HOUSE OF REPRESENTATIVES; HONORABLE RANDY EWING, PRESIDENT, LOUISIANA SENATE

IN RE: Slidell 76 Travel Center d/b/a; Travel Centers of America; Four Rivers Gaming Inc.; – Other(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA99 1297; Parish of East Baton Rouge 19th Judicial District Court Div. "D" Number 434,700

June 14, 1999

Denied.

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CDT

LEMMON, J. would grant and docket.

JOHNSON, J. not on panel.

Supreme Court of Louisiana
June 14, 1999

/s/ John Tarlton Olivier
Clerk of Court
For the Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 28, 1999

Mr. Paul Baier
4222 Hyacinth Street
Baton Rouge, LA 70808

Re: Premier Games, Inc., et al.
v. Louisiana, et al.,
Application No. A-1098

Dear Mr. Baier:

The application for a stay of judgment pending the filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on June 28, 1999 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely.

WILLIAM K. SUTER, Clerk

By /s/ Cynthia Rapp
Cynthia Rapp
Assistant Clerk

Charles A. BROWN d/b/a
Triambient Lounge & Restaurant

v.

STATE of Louisiana, Through the DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, LOUISIANA GAMING CONTROL BOARD.

No. 96-CA-2204.

Supreme Court of Louisiana.

Oct. 15, 1996.

Rehearing Denied Oct. 18, 1996.

Opinion Concurring on Denial of Rehearing by Justice Kimball
Oct. 18, 1996.

Opinion Concurring on Denial of Rehearing by Justice Lemmon
Oct. 18, 1996.

Richard P. Ieyoub, Attorney General, Cheney C. Joseph, Jr., Executive Counsel, Jenifer Schaye, Robert B. Barbor, Ann Neeb, Baton Rouge, for Applicant.

Brett Alan Sulzer, Frank D. Blackburn, Baton Rouge, for Respondent.

Basile Joseph Uddo, New Orleans, for A.M.A. Distributors Inc., and Delta Gaming, Inc. (amicus curiae).

Hillar Clement Moore, III, Paul R. Baier, Brett A. Sulzer, Baton Rouge, for SouthWest Louisiana Small Business for Gaming (amicus curiae).

Perry Roger Staub, Jr., Eugene P. Urbanowicz, Jr., Darrell Arthur Clay, Lance Paul Martin, William Patrick Quigley, New Orleans, for ACLU.

WATSON, Justice.[1]

This is a direct appeal from the trial court's declaration that R.S. 27:13(C)(6) is unconstitutional insofar as it restricts contributions to committees supporting or opposing issues.

FACTS

Plaintiff, Charles A. Brown d/b/a Triambient Lounge & Restaurant is a video gaming licensee of the Louisiana Gaming Control Board who wishes to contribute to an advertising fund promoting video poker.

The pertinent part of the statute, R.S. 27:13(C)(6) provides:

> No member or board employee nor a member of the immediate family of a board member or board employee nor any casino operator or any other licensee or permittee shall make a contribution or loan to, or expenditure on behalf of, a candidate or committee.

Like all legislative enactments, R.S. 27:13(C)(6) enjoys a presumption of constitutionality. *Polk v. Edwards*, 626 So.2d 1128 (La.1993).

In the definitions section of the statute, the words "candidate" and "committee" are defined according to R.S. 18:1483.

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[1] Victory, J., not on panel. Rule IV, § 3.

R.S. 18:1483(3)(a) defines a candidate. The word includes any public servant required to file campaign finance reports and anyone whose expenditures or contributions exceed $500.00. The candidate prohibition is not at issue here.

"Committee," R.S. 18:1483(14), means two or more persons organized to support or oppose any candidate, proposition, recall or political party which handles funds in excess of $500.00 within a calendar year. Candidate committees are not an issue here.

After the enactment of R.S. 27:13(C)(6), the Louisiana Gaming Control Board adopted Emergency Rule 107, which provides: "no casino operator, licensee or permittee of the Board shall make a contribution, loan, or expenditure to or on behalf of a candidate or committee."

The trial court decided that R.S. 27:13(C)(6) insofar as it restricts contributions to committees supporting or opposing issues, i.e., independent expenditures not linked to a candidate, is unconstitutional. The trial court issued a preliminary injunction. A suspensive appeal was granted.

LAW

Strict scrutiny applies to any regulation of First Amendment rights. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

The Supreme Court's most recent expression on the First Amendment versus gambling regulation was in *Greater New Orleans Broadcasting Assn. v. U.S.*, ___ U.S. ___, 117 S.Ct. 39, 136 L.Ed.2d 3 (1996) which vacated a

U.S. Fifth Circuit opinion at 69 F.3d 1296 (5th Cir.1995). *See* Dana M. Shelton, Note, *The Fifth Circuit Upholds Federal Ban on Casino Gambling Advertising Against First Amendment Challenge: Greater New Orleans Broadcasting Association v. United States*, 70 TUL. L. REV. 1725 (1996). The Fifth Circuit held that the substantial governmental interest served by a federal statute prohibiting casino gambling radio and television advertisements was sufficient to override the First Amendment. Judge Politz stated in dissent:

> . . . protection of commercial speech is not vitiated when the speech concerns lawful but potentially harmful activity, such as alcohol consumption or gambling. 69 F.3d at 1303.

The United States Supreme Court remanded the *Greater New Orleans Broadcasting Assn.* case for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. ___, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

Liquormart held that Rhode Island's ban on advertising retail liquor prices except at the place of sale violated the First Amendment. Speech prohibitions of this type rarely survive constitutional review. *Liquormart* states that *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986) "clearly erred" in allowing a legislature to suppress casino advertising. *Liquormart*, ___ U.S. at ___, 116 S.Ct. at 1511-12, 134 L.Ed.2d at 732.

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), held that the Federal Election Campaign Act's candidate political contribution ceilings did not violate the First Amendment or invidiously discriminate against

non-incumbent candidates. They were supported by the substantial government interest in limiting corruption.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), held that a Massachusetts statute, which prohibited certain corporations from making contributions to influence votes, was an unconstitutional abridgement of free speech in violation of the First and Fourteenth Amendments. The question in that case was whether the corporate identity deprived the speech of its otherwise clear entitlement to protection. Justices White, Brennan, and Marshall dissented, stating that the statute properly prohibited corporate management from using corporate monies to promote management's personal views. Justice Rehnquist also dissented on the ground that business corporations, unlike natural persons, have a limited right of political expression.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) dealt with a Berkeley, California ordinance limiting contributions to committees formed to support or oppose ballot measures to $250.00. The California Supreme Court held that the ordinance furthered compelling governmental interests because it insured that special interest groups could not corrupt the initiative process by spending large amounts to support or oppose a ballot measure. The United States Supreme Court reversed, holding that the ordinance's restraints on association and expression contravened the First Amendment. There is no significant state interest in curtailing debate and discussion of ballot measures.

Citizens Against Rent Control states:

> Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression. As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny. 454 U.S. at 298, 102 S.Ct. at 438, 70 L.Ed.2d at 500.
>
> Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. 454 U.S. at 299, 102 S.Ct. at 439, 70 L.Ed.2d at 501.

Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) held that an expenditures limitation on political committees was constitutionally infirm. Preventing corruption or the appearance of corruption is the only justification for restricting campaign financing. The fact or appearance of corruption is defined as a "financial *quid pro quo* of dollars for political favors" from a candidate. 470 U.S. 480 at 497, 105 S.Ct. 1459 at 1468-69. There is a fundamental constitutional difference between money spent to advertise views and money contributed to a candidate.

The trial court here relied on *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir.1980), *aff'd*, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284, *cert. denied*, 454 U.S. 1142,

102 S.Ct. 999, 71 L.Ed.2d 293 (1982), which held that a Florida statute restricting contributions to political committees organized to urge passage of a casino gambling amendment was unconstitutional. *Let's Help Florida* points out the distinction between the State's interest in regulating a candidacy election and an issue referendum election. *Let's Help Florida* holds that:

> . . . the Florida statutes that restrict the size of contributions in a referendum election abridge important first amendment rights and are ill-suited for preventing corruption or for promoting disclosure. 621 F.2d at 201.

Colorado Repub. Campaign Comm. v. FEC, 518 U.S. ___, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) held that Colorado limitations on a political party's expenditures in a U.S. Senate campaign violated the First Amendment. The *Colorado* case makes explicit the distinction between expenditures coordinated with a candidate and independent expenditures.

The opinion in *Colorado* has three judges expressing the view that independent expenditures are entitled to First Amendment protection. Four judges concurred in the result but dissented from the candidate exception, stating that regulation of candidate expenditures is not permitted by the First Amendment. Two dissenting justices expressed the view that political party expenditures to secure the election of its candidate ought to be considered candidate contributions. Thus, a clear majority of seven held that limits on independent expenditures violate the First Amendment.

The vast majority of federal and state courts have upheld constitutional challenges to committee contribution restrictions. One New Jersey court of appeal allowed a prohibition against gambling interest contributions.

Soto v. State, 236 N.J.Super. 303, 565 A.2d 1088 (App.Div.1989), U.S. *cert. denied*, 496 U.S. 937, 110 S.Ct. 3216, 110 L.Ed.2d 664 (1990), dealt with a New Jersey statute prohibiting casino officers or key employees from contributing to candidates or groups organized to support candidates. *Soto* states: "Gambling is an activity rife with evil. . . . it is the pronounced policy of the State to regulate and control the casino industry with the utmost strictness to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained." 565 A.2d at 1094. The *Soto* plaintiff argued that she was being denied equal protection because the prohibition did not extend to those in the liquor and horse racing businesses. The argument was rejected on the ground that casino gambling is a unique activity.

Soto is the only case supporting the State of Louisiana's position in support of the legislation. However, the New Jersey statute prohibited casino contributions to candidates or groups organized to support candidates. Here we are dealing with contributions to promote a point of view, a decided difference. *Colorado, supra.* Regardless of *Soto*'s merits, its rationale does not apply here.

CONCLUSION

The expenditures prohibited by the Louisiana statute are clearly independent expenditures, not candidate coordinated, and are entitled to the broadest First Amendment protection. Individuals, candidates, political committees and political parties have a constitutional right to make unlimited independent expenditures. *Citizens Against Rent Control, supra; Federal Election Comm'n, supra; Colorado, supra.*

When a matter is submitted to the public for a vote, it is essential that the public has a free flow of information. *Greater New Orleans Broadcasting Assn., supra.* The fact that many consider gambling and liquor vices does not justify the suppression of differing views. There is no vice exception to the right of free speech. *Liquormart, supra,* ___ U.S. at ___, 116 S.Ct. at 1513, 134 L.Ed.2d at 734. Contributions to committees advocating a point of view cannot be restricted without violating the First Amendment. *Citizens Against Rent Control, supra.*

The State's interest in limiting contributions to candidates and candidates' political committees does not justify limiting contributions to committees supporting or opposing ballot measures. *First National Bank of Boston, supra.* The corruption rationale only applies to candidate or candidate committee limitations. *Citizens Against Rent Control, supra.*

Gambling activity is strictly regulated and may be suppressed. However, the State may not ban commercial speech simply because the State may constitutionally prohibit the underlying conduct. *Liquormart, supra,* ___ U.S. at ___, 116 S.Ct. at 1512-13, 134 L.Ed.2d at 733.

The First Amendment clearly prohibits suppression of information. Communicating ideas requires the expenditure of money, and Louisiana may not restrict contributions to political committees organized to communicate ideas.

DECREE

R.S. 27:13(C)(6) is clearly unconstitutional under the First Amendment to the U.S. Constitution insofar as it prohibits contributions to committees supporting or opposing ballot measures. The equal protection question is pretermitted. The trial court correctly found the law unconstitutional in part and granted a preliminary injunction. The trial court judgment is affirmed. The State of Louisiana and the Louisiana Gaming Control Board are enjoined against enforcing R.S. 27:13(C)(6) and Emergency Rule 107 insofar as they prohibit contributions, expenditures and loans to independent committees unconnected with candidates. Any rehearing applications must be filed within forty-eight hours of rendition of this opinion, which is handed down at 2:35 p.m., October 15, 1996.

AFFIRMED. INJUNCTION ISSUED. REHEARING DELAY LIMITED TO FORTY-EIGHT HOURS.

BLEICH, J., dissents and assigns reasons.

BLEICH, Justice, dissenting.

This case is not factually ripe for decision. A matter of this importance should be decided only after a full trial on the merits, not a scant hearing for a preliminary injunction. With the deepest respect to the majority and

persuaded that the plaintiff possesses a compelling legal argument, I believe that the majority decides this matter too hastily. Without receiving evidence, the trial court has held, and the majority of this court has affirmed, that the LSA-R.S. 27:13 C(6) restriction on political contributions to political action committees[1] by gambling interests is an unconstitutional infringement of these persons' First Amendment rights. The protection of First Amendment rights is of paramount importance. However, this decision should not be made without a complete record before this court. I would therefore remand this matter to the trial court for a full evidentiary hearing.

The First Amendment operates to protect both political expression and political association. *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 632-33, 46 L.Ed.2d 659 (1976). However, this constitutional interest may be impeded if the state has a sufficiently compelling countervailing interest, and the stricture is narrowly tailored to meet the concern. *Id.* at 25, 96 S.Ct. at 637-38; *NAACP v. Alabama*, 357 U.S. 449, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958).

I would allow the State to introduce evidence to demonstrate that limiting the political influence of gambling interests in the State of Louisiana is a sufficiently compelling interest to justify this statutory ban. The State would also have to demonstrate that the statute at issue is narrowly tailored to accomplish its goals of preventing

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[1] Not at issue this date is the question of the validity of contributions to candidates. Since that issue will probably be ultimately presented to this court, this writer finds it yet more imperative that a fully developed record be presented.

corruption and the appearance of impropriety in the gambling industry.

Gambling was legalized in this state only after earnest and sustained debate by the legislature.[2] Citizens voiced apprehensions concerning increased crime, poverty, and government corruption, and expressed fears regarding the adverse impact of legalized gambling upon families and communities. Gambling was finally approved only after assurances of stringent regulation of the industry by government. LSA-R.S. 27:2(A).

The State argues that the Act at issue serves the interest of preventing the large sums of money accessible to gambling interests from overwhelming the marketplace of ideas in their favor, to an extent that competing interests are unable to match. This statute would, according to the state, serve the interest not only of preventing gambling interests from attaining unwarranted political voice and clout, it would also help avoid the appearance of corruption in the industry. The State should be given the opportunity to present evidence to support these positions.

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[2] This writer would also note that this debate has been perpetuated by this court's erroneous decision in *Polk v. Edwards*, 626 So.2d 1128 (La.1993). However, the validity of *Polk* is not before us today.

Given Louisiana's history of corruption in the gambling industry,[3] and the problems already mounting in

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[3] This writer takes notice of a mere sampling of news articles and excerpts therefrom:

T.J. Simoneaux, "First Lottery in La. Led to National Ban – LSU Professor Examines Similarities, Differences," *The Baton Rouge Advocate*, Jan. 9, 1986, at 1A:

> Gov. Edwin Edwards' proposal for a state lottery to ease Louisiana's financial crunch naturally has resurrected memories of the state's initial stab at a large-scale game of chance: the 1868-1893 Louisiana State Lottery Co.
>
> That **lottery – a corrupt enterprise** approved by bribed legislators and run by two New York "carpetbaggers" – garnered millions for a few people, but almost nothing for Louisiana, whose severe economic problems then paralleled the state's situation today, an LSU history professor says.
>
> • • •
>
> The Louisiana State Lottery Co. continued to bribe legislators to keep its franchise and paid off state newspaper editors to ensure a good public image, Carleton says. But officials and newspapers in other state [sic] began to publicize allegations about the "Golden Octopus," as the lottery's detractors called it in reference to the way it "stretched into every area of the nation," Robbins wrote in the Smithsonian. By 1879, anti-lottery forces here were strong enough to have the Legislature take away the company's charter.

T.J. Simoneaux, "Gambling is as Common as Crawfish to Louisiana," *The Baton Rouge Advocate*, Jan. 8, 1986, at 1A: As early as the colony's founding in 1699, Louisiana officials reported trouble in trying to stop games of chance. Gambling was legalized in 1823 and New Orleans soon had 14 casinos, which offered such games as faro, roulette and 21. However,

the industry, particularly concerning video poker gambling, this issue is of prime concern as the legislature

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pressure from religious and other community groups ended legalized gambling in 1836.

* * *

> In Baton Rouge, the election of new officials spurred a parish grand jury investigation that resulted in widespread indictments in 1948 for violation of gambling laws.

Elizabeth Mullener, "The Once and Future Gambling Town," *New Orleans Times Picayune*, June 14, 1992, at A1:

> From the early 18th century, New Orleans has been a hotbed of gambling activity. Since the first settlers played games of chance in ale houses and taverns, the city has lived up to its reputation as an easy place to find trouble, tolerant of free spirits and free spending alike.
>
> At times gambling has been legal; at times it has been illegal; at times it has been somewhere in between. Games are sometimes wide open and sometimes strictly underground. But always, through even the most stringent efforts at reform, gambling has endured.
>
> And always it has attracted liberal doses of the vices that traditionally go along with it – prostitution, crime and most of all, corruption.

Marsha Shuler, "State's Last Lottery Booted by 40-1 Margin," *The Baton Rouge Advocate*, Jan. 9, 1986, at 7B:

> The last time Louisiana voters had a lottery proposition on the ballot they voted it down by a 40-1 margin.

works to keep its promise to the people of controlling gambling and keeping it clean.

The only restriction drawn by the Act is the prevention of payments to Political Action Committees by owners of gaming establishments. However, the state has not been allowed to show that this is the least restrictive alternative *via* an evidentiary hearing. At such trial, the plaintiffs could also attempt to introduce evidence that the statute is too broadly drawn to effect only its limited purpose.

The theories and positions of the respective parties should be fully developed and then considered only after a full trial on the merits allowing all parties to present any admissible evidence. Parenthetically, it is noted by counsel for Amici Curiae that "there is no evidence in the record supporting the State's absolute ban on contributions aimed at promoting video poker . . . "[4] The reason

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That was in March 1892 when voters shut down the now legendary Louisiana Lottery.

* * *

The U.S. Congress stepped into the picture, barring from the mails all letters, newspapers and circulars with information about the lottery.

The action came at the urging of President Benjamin Harrison who said: "The people of all states are debauched and defrauded . . . by the Louisiana Lottery."

See also, Charles Hunt, "Riverboats and Racetracks – In 19th Century, Louisiana Had Games for All Tastes," *The Baton Rouge Sunday Advocate*, Sept. 4, 1994, at 18 Magazine.

[4] *Brief of Amici Curiae Southwest Louisiana Small Businesses for Video Gaming, et al., In Support of Appellee Charles A. Brown*, p. 1.

for this lack of evidence stems perhaps from the fact that the decision made by the lower court was in the context of a preliminary injunction and not a permanent injunction. Counsel for Southwest is correct in stating that this court is "never told how outlawing industry contributions to media PACs favoring retention of video poker will corrupt the democratic process." Precisely this and the entire record compels a call for a complete presentation of evidence. What has led this court to this procedural and time-constraint posture is of no moment now.

This decision should not be made in a rush to judgment to answer questions simply because of an election. The issues involved before this court are far too important to be decided hastily.[5] Elections may come and go, referenda may be submitted, debated and decided. Important issues such as these before us involving free speech and the legitimate interests of the state should be decided only after a full review of not just the law but also a complete record.

Being of the opinion that this case is premature for decision, and that all parties should be required to present their cases before the lower court, which record can then be reviewed, I have unsuccessfully argued to the majority that their decision today is premature.

I respectfully dissent.

KIMBALL, Justice, additionally concurring in denial of rehearing.

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[5] The referendum election date is Nov. 5, 1996.

Counsel for all parties have stressed an urgency for a speedy decision.

In my view, plaintiffs herein have made a successful facial attack on the constitutionality of LSA-R.S. 27:13(C)(6). I believe the United States Supreme Court has made it abundantly clear that there is no state interest in depriving any citizen from exercising his or her First Amendment rights to promote ballot measures.

The Louisiana Constitution gives this court appellate jurisdiction to determine the constitutionality *vel non* of a statute or ordinance that has been declared unconstitutional by a lower court, whatever the procedure, which we have properly done in this case. La. Const. art. 5, § 5(D); *see, e.g., Louisiana Republican Party v. Foster*, 96-0314 (La. 5/21/96), 674 So.2d 225; *City of Baton Rouge v. Ross*, 94-0695 (La. 4/28/95), 654 So.2d 1311, 1325 (Calogero, C.J., concurring). Plaintiffs herein have successfully brought a *facial challenge* to the constitutionality of LSA-R.S. 27:13(C)(6). That statute, insofar as it restricts the ability of certain citizens to engage in the political process by voicing their opinions on a ballot measure, undercuts the very essence of the right of free speech secured by the First Amendment. There is, therefore, no valid reason to require these parties to engage in a useless hearing to allow the State an opportunity to prove that which cannot, as a matter of constitutional law, be proven. As the United States Supreme Court has clearly stated, "there is no significant state or public interest in curtailing debate or discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299, 102 S.Ct. 434, 439, 70 L.Ed.2d 492, 501 (1981).

LEMMON, Justice, additionally concurring in denial of rehearing.

The State is correct that the trial court, at this stage of this action for declaratory judgment and ancillary injunctive relief, only should have granted a preliminary injunction upon plaintiffs' showing of the likelihood of success on the merits. Nevertheless, I vote to deny the rehearing application because the State has not asserted in this proceeding a compelling governmental interest in protecting corruption of the electorate that would justify La. Rev. Stat. 27:13(C)(6)'s limitation on contributions to committees formed to favor or oppose ballot measures. Accordingly, evidence regarding these asserted interests at the trial on the merits of the final injunction or the declaratory judgment would be of no avail.

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

PREMIER GAMES, INC. THROUGH GERALD D. GOUDEAU, JR., ET AL.

VERSUS

THE STATE OF LOUISIANA THROUGH HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, ET AL.

NO. 97-CW 2231
(Filed Oct. 31, 1997)

In re: The State of Louisiana, Speaker of the Louisiana House of Representatives Hunt Downer and President of the Louisiana Senate Randy Ewing, applying for a supervisory writ, 19th Judicial District Court, Parish of East Baton Rouge, No. 434,700, Division "D".

WRIT GRANTED. The judgment of the trial court overruling the objection of no cause of action as it relates to the portion of this suit concerning the nullification of the November 5, 1996 election regarding local option video poker hereby is reversed, and the judgment is entered in the relators' favor, granting the exception. The petition failed to allege that except for irregularities or fraud in the conduct of an election the result would have been different. The allegations raised by the plaintiffs all concern alleged infringements on First Amendment rights almost three weeks prior to the election. Therefore,

no allegations concern irregularities or fraud in the "conduct of an election" that would otherwise have resulted in a different outcome. Further, we note this case has not been treated as an election case in the lower court and as to that point no party has sought any form of judicial review.

DMG
RHP
RET

COURT OF APPEAL, FIRST CIRCUIT

/s/ Diane M. Edwards
DEPUTY CLERK OF COURT
FOR THE COURT

The Supreme Court of the State of Louisiana

PREMIER GAMES, INC. THROUGH GERALD D. GOUDEAU, JR., ET AL.

NO. 97-CC 2786

VERSUS

THE STATE OF LOUISIANA THROUGH HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, ET AL.

IN RE: Premier Games Inc.; Goudeau, Gerald D. Jr.; – Plaintiff(s); Applying for Supervisory and/or Remedial Writ; Parish of East Baton Rouge 19th Judicial District Court Div. "D" Number 434,700; to the Court of Appeal, First Circuit, Number CW97 2231

January 30, 1998

Denied.

JTK
PFC
HTL
CDK
BJJ
JPV
CDT

MARCUS, J. not on panel.

Supreme Court of Louisiana

January 30, 1998

/s/ John Tarlton Olivier
Clerk of Court
For the Court